Supreme Court, U. S.
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No. 80-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,

Petitioners,

—against—

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, F. RAY MARSHALL, Secretary of Labor, and EULA BINGHAM, Assistant Secretary of Labor for Occupational Safety and Health,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia

CARL F. GOODMAN
Surrey & Morse
485 Madison Avenue
New York, New York 10017
(212) 935-7700
Attorney for the Petitioner South Central Bell Telephone Company and Bell System, Petitioners

Of Counsel:

JAMES A. DEBOIS
JAMES E. BARDEN
American Telephone &
Telegraph Company
295 N. Maple Avenue
Basking Ridge, New Jersey 07920

January 9, 1981

QUESTIONS PRESENTED

Petitioners herein join in the questions presented in the Petition for Certiorari filed by the Lead Industries Association, Inc. ("LIA"), and concur in the reasons set forth in that Petition as to why it should be granted. In addition, Petitioners believe that the following two additional questions are worthy of certiorari.[1]

1. Where OSHA has failed to explain its action in applying a standard to an industry and, has failed to make a threshold finding of "significant risk of harm at the workplace" in such industry, must the standard be vacated as to said Industry?

2. Does a court of appeals have authority to require an industry to comply with an OSHA standard during the period of remand of such standard to the agency, when there is no substantial evidence in the record to support the standard at issue?

LIST OF PARTIES

The names of the petitioners or intervenors who sought review of the revised permanent standard for occupational exposure to lead issued by the Occupational Safety and Health Administration on November 13, 1978, 43 Fed. Reg. 53007-14 (November 14, 1978) are set forth in footnote 2 below.[2] The

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1 The questions presented herein, while relevant to some of the Petitioners in Petition No. _____ filed by the Lead Industries Association et. al., do not form the main concern of most of the separate industries joining in said Petition.

2 United Steelworkers of America, AFL-CIO-CLC; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America; National Constructors Association; Oil, Chemical and Atomic Workers International Union; and Cast Metals Federation (No. 79-1048); American Iron & Steel Institute, Inc.; Bethlehem Steel Corp.; Jones & Laughlin Steel Corp.; National Steel Corp.; Republic Steel Corp.; United States Steel Corp.; and The Shipbuilders

respondents are F. Ray Marshall (Secretary of Labor), Dr. Eula Bingham (Assistant Secretary of Labor for Occupational Safety and Health) and the Occupational Safety & Health Administration.

Council of America (No. 79-1054); Lead Industries Association, Inc.; Chloride, Incorporated; Standard Industries; Dixie Metals Co.; Schuylkill Metals Corp.; and Bunker Hill Co. (No. 79-1078); Battery Council International, Inc. (No. 79-1079); ASARCO Incorporated (No. 79-1080); Southwire Co. (No. 79-1081); National Paint & Coatings Association, Inc. and Sigma Coatings, Inc. (No. 79-1082); PPG Industries, Inc. (No. 79-1083); South Central Bell Telephone Co., Inc.; Southern Bell Telephone and Telegraph Co.; Southwestern Bell Telephone Co.; American Telephone and Telegraph Co.; Bell Telephone Co. of Nevada; The Bell Telephone Co. of Pennsylvania; The Chesapeake and Potomac Telephone Co.; The Chesapeake and Potomac Telephone Co. of Maryland; The Chesapeake and Potomac Telephone Co. of Virginia; The Chesapeake and Potomac Telephone Co. of West Virginia; Cincinnati Bell Incorporated; The Diamond State Telephone Co.; Empire State Subway Co. (Limited); Illinois Bell Telephone Co.; Indiana Bell Telephone, Inc.; Michigan Bell Telephone Co.; The Mountain States Telephone and Telegraph Co.; Malheur Home Telephone Co.; The Ohio Bell Telephone Co.; New England Telephone and Telegraph Co.; New Jersey Bell Telephone Co.; New York Telephone Co.; Northwestern Bell Telephone Co.; Pacific Northwest Bell Telephone Co.; The Pacific Telephone Co.; The Southern New England Telephone Co.; Wisconsin Telephone Co.; Bell Telephone Laboratories, Inc.; Transoceanic Communications, Inc.; Transoceanic Cable Ship Company, Inc.; and Transpacific Communications, Inc. (No. 79-1084); General Motors Corp. (No. 79-1106); Ford Motor Co. (No. 79-1107); Chrysler Corp. (No. 79-1108); National Association of Recycling Industries, Inc.; Inland Metals Refining Co.; Keystone Resources Corp.; and RSR Corp. (No. 79-1111); Ethyl Corp. (Nos. 79-1114 and -1145); Corning Glass Works (No. 79-1120); St. Joe Minerals Corp. (No. 79-1121); and RSR Corp. (No. 79-1146).

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OPINION BELOW

The opinions of the Court of Appeals are unofficially reported at 8 O.S.H.C. 1810 (August 28, 1980) and appear in the Appendix to the petition of the Lead Industries Association (pages 1a to 286a).[3] The standard for occupational exposure to lead (the "Standard") which was issued by OSHA on November 13, 1978, is found at 43 Fed. Reg. 53007-14 (Nov. 14, 1978); OSHA's preamble and explanatory text appear in vol-

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3 The majority decision was written by Chief Judge Wright, with Judge Robinson concurring, and is cited to the Appendix in LIA's petition as "Maj. Op. at ____"; the dissent was written by Judge MacKinnon and is cited "Diss. Op. at ____".

ume 43 of the Federal Register at pages 52952-53007 (Nov. 14, 1978) and pages 54354-509 (Nov. 21, 1978), and are cited by Federal Register page and column (*e.g.* 52952/1).

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1980. Petitions for rehearing were filed by National Association of Recycling Industries, Inc. on August 29, 1980, and, as permitted by the lower court, by South Central Bell Telephone Co. (Bell System Petitioners), and others on September 25, 1980. On October 16, 1980, certain industry petitioners moved for a stay of the Standard until 30 days after the final determination of the rehearing petitions, advising the Court of Appeals that "the industry petitioners in this action intend to seek review by the Supreme Court in the event that their Rehearing Petition is denied." By order dated October 24, 1980, the lower court denied all pending motions and directed that the mandate become effective immediately. Subsequent applications to this Court by NARI, the American Iron and Steel Institute, LIA and others for a stay of the standard were granted on December 8, 1980 with respect to provisions relating to engineering and work practice controls, compliance plans, new hygiene facilities ZPP tests, multiple physician review procedures, signs and certain start up dates. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provisions involved in this case are: Sections 3(8), 4(b)(4), 6(b)(5), 6(b)(7) and 6(f) of the Occupational Safety and Health Act (the "Act"), 29 U.S.C. §§ 652(8), 653(b)(4), 655(b)(5), 655(b)(7) and 655(f). The relevant text of these provisions is set forth at pages 287a through 290a of the Appendix to the Petition of the Lead Industries Association No. _____.

STATEMENT OF THE CASE

Petitioners adopt the statement of the case appearing in the Petition for Certiorari of the LIA and other Petitioners No. _____. This statement of the case is limited to those matters which are of special significance in connection with the questions presented herein.

Petitioners herein are operating telephone companies, research facilities and their subsidiaries who constitute a major segment of the telecommunications industry. Unlike most of the Petitioners in Lead Industries Association, Inc. Petition No. _____, they are not industries with factories, smelters, or other industrial establishments having a fixed work place. Petitioners maintain, repair and replace the telecommunications cable which runs underground or on telephone poles in the open atmosphere. To the extent that employees in this industry have any exposure to lead, such exposure arises from activities involving the handling of telecommunications cable. Such cable is but one method by which telecommunications are transmitted. Most telecommunications cable is sheathed in a form of "plastic." Occasionally a telecommunications worker may have to perform repair operations or replacement operations involving lead-sheathed cable. The employees who perform such work are a highly mobile work force who move from place to place, sometimes working at several different worksites during the same day. Unlike factory workers Bell System linespeople and splicers perform their services either in the open air on telephone poles or near ditches where cable is buried, or in manholes under the streets of cities.

During the course of the OSHA proceedings herein, OSHA considered whether to apply a permissible exposure limit of 100 ug/m^3 to airborn occupational exposure to lead. Without notifying the various industry groups which had appeared at the earlier hearings, and without publishing notice of the fact in the Federal Register, OSHA ultimately adopted a permissible exposure limit of 50 ug/m^3. OSHA purported to justify the 50

ug/m³ PEL on the basis of a theoretical (but demonstrably incorrect) model which was prepared by the Center for Policy Alternative (CPA) to predict blood-lead levels from occupational air-lead concentrations. This model, as well as all the industrial studies contained in the administrative record dealing with the issue of a permissible exposure limit, focused on assumptions involving workers in a factory environment who come in contact with airborn lead on a five-day week, eight-hour a day basis. None of the scientific studies in the record or any theoretical models based thereon dealt with an industry in which exposure to lead was low level and intermittent, nor does the administrative record contain any extrapolation of data from the CPA model to an industry with intermittent exposure.[4]

OSHA issued the standard for occupational exposure to lead on November 13, 1978. On November 14, 1978, OSHA published the standard, preamble and some explanatory material concerning such standard. On November 21, 1978 further explanatory material was published. While the preamble and explanatory material occupy several hundred pages of the Federal Register, there is no reference anywhere in such material to the telecommunications industry. However in a reference in such material to an industry characterized by intermittent exposure and a mobile work force, OSHA set forth such characteristics as grounds for *excluding* the construction industry from the scope of the standard's reach.

Bell System Petitioners herein joined with other industry petitioners in the proceedings below challenging the standard. In addition, petitioners argued *inter alia,* that OSHA had failed to adequately explain its action in applying the standard to the telecommunications industry and that the record failed to contain any evidence that the standard is feasible for the

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4 We do not wish to imply that OSHA properly utilized the CPA model in connection with other industries; indeed, we would submit that OSHA did not. We simply note here that there was no record evidence which was applicable to the circumstances found in the telecommunications industry.

telecommunications industry. The Court of Appeals, in its decision below, recognized both that OSHA had failed to explain its action in applying the standard to the telecommunications industry and also that the record failed to contain evidence of feasibility as to said industry. While the Court of Appeals remanded the standard for reconsideration on the feasibility issue, it nonetheless held that the telecommunications industry was required to comply with most parts of the standard during the period of remand.[5] Accordingly, Petitioners are presently subject to most parts of the standard.

REASONS FOR GRANTING THE WRIT

THE DECISION BY THE COURT BELOW IS INCONSISTENT WITH ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW AND IN THE FIRST OSHA CASE TO BE DECIDED BY A COURT OF APPEALS SINCE THIS COURT'S DECISION IN *AMERICAN PETROLEUM INSTITUTE* SERIOUSLY MISCONSTRUES THAT DECISION CREATING SUBSTANTIAL UNCERTAINTY ON ISSUES RELATING BOTH TO ADMINISTRATIVE LAW IN GENERAL AND THE PROPER INTERPRETATION OF THE OCCUPATIONAL SAFETY AND HEALTH ACT.

The recent activities of the American Bar Association's prestigious Commission on Law and the Economy attest to the fact that our society is greatly concerned over the appropriate role of administrative agencies in regulating conduct. With increasing vigor, our society is demanding that administrative agencies explain their actions. The court below, in rejecting

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5 The majority of the panel below lumped the telecommunications industry in with a group of some 30 other industries and ordered that during the period of the remand "these industries, however shall be immediately required to meet the PEL of 50 ug/m³ by some combination of engineering, work practice, and respirator controls." (Maj. Op. at 245)

established principles of administrative law requiring such explanation, *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194 (1947), has turned back the clock of administrative democracy and has rejected the learning of other courts of appeals specifically holding that such rule applies in OSHA standard setting. The rejection by the court below of this Court's decision in *Industrial Union Department v. American Petroleum Institute,* 100 S. Ct. 2844 (1980) by permitting an OSHA standard to remain in effect although there has been no finding that there exists a substantial risk to health at the worksite in the telecommunications industry, when coupled with the agency's failure to explain its action in applying the standard to such industry, brings the regulatory process into disrepute and creates confusion in the courts of appeals and a conflict with the decision of the Court of Appeals for the Fifth circuit in *Texas Independent Ginners Association v. Marshall,* 630 F.2d 398 (5th Cir. 1980) as to how to apply this Court's ruling in *American Petroleum Institute.*

The confusion created by the holdings of the court of appeals below in applying this standard to the telecommunications industry, notwithstanding the total failure of the agency to explain why that industry should be subject to the standard and notwithstanding the complete failure of the agency to make any determination that risk exists at worksites in said industry, extends beyond OSHA standard setting. Such confusion extends to all notice and comment rulemaking by administrative agencies. Given the pervasive nature of regulatory action in today's society, this uncertainty should be resolved as quickly as possible.

A. The court below allowed OSHA to apply a standard to the telecommunications industry without explaining its reasons for such action and without requiring that OSHA make a preliminary finding of significant risk of harm at the worksite in that industry.

The court of appeals below, in requiring the telecommunications industry to comply during the period of remand with the standard governing occupational exposure to lead, notwithstanding the fact that, as the court of appeals itself noted, telecommunications was "never even mentioned in the Preamble [of the lead standard]" (Maj. Op. at 224 n. 162) has placed itself in direct conflict with the decision of the Third Circuit in *Dry Color Manufacturers Association v. Department of Labor,* 485 F.2d 98, 105 (3d Cir. 1973) and *AFL v. Brennan,* 530 F.2d 109 (3d Cir. 1975). The Third Circuit has specifically held that section 655(e) of the Occupational Safety and Health Act (29 U.S.C. § 655(e)) is a codification of the well-established administrative law principle that an agency must explain its actions. The rationale for this rule is several fold. By requiring an agency to explain itself, an internal check on arbitrary agency action is created, informed public criticism of agency decisions is facilitated and an important part of the record for review by a reviewing court is created. *Dry Color Manufacturers Association v. Department of Labor supra.* It has long been recognized that an agency's orders may not be upheld by a court on any basis other than that basis set forth by the agency itself. *SEC v. Chenery Corp., supra; FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 246 (1972). Unless the agency's action can be supported on the explanation set forth by the agency itself, the proper course for a reviewing court to take is to vacate the agency order and remand the matter for further proceedings. *Camp v. Pitts,* 411 U.S. 138 (1973).

Rejecting these established principles, the court of appeals below in the name of (but as its rejections of *American Petroleum Institute* shows, not in the reality of) concern for employee health, has substituted its judgment for that of the

administrative agency. Congress did not provide that the court of appeals for the District of Columbia Circuit should impose Occupational Safety and Health standards on industries where the agency itself had not made a reasoned determination that such industries should be covered. Cf. *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1977). By ordering the telecommunications industry to comply with the standard for occupational exposure to lead notwithstanding the fact that the agency has never set forth a reasoned explanation as to why the standard should be applied to the telecommunications industry, the court below has usurped the functions of the administrative agency and has superimposed its own will over that of both Congress and the agency.[6]

Shortly before the decision rendered by the majority below, this Court rendered its decision in *Industrial Union Department v. American Petroleum Institute, supra.* In that case, a plurality of this court specifically held that the Occupational Safety and Health Act required that OSHA must make a threshold finding of significant risk to health at the workplace before promulgating a standard for occupational health. In the instant case, since the telecommunications industry was "never even mentioned in the Preamble [to the standard]" it is obvious that no finding as to this industry could have been made by OSHA. The unique circumstances of the telecommunications industry where employees are highly mobile, where worksites are typically exposed to the atmosphere, where length of duration of a single operation is very short, and where exposure to lead is intermittent, all command that the required finding of risk from exposure to lead must be specific to the telecommunications industry and cannot be extrapolated from

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6 The agency explicitly excluded the construction industry from coverage of the lead standard. The reasons for excluding the construction industry apply with equal force to the telecommunications industry. While recognizing the similarity between the construction and telecommunications industries (footnote 168) the court of appeals nonetheless sanctioned, without explanation, the application of this standard to the telecommunications industry during the period of remand.

generalized concepts regarding industrial uses of lead. Unlike this Court which vacated the benzene standard because of OSHA's failure to make this threshold finding, and the Fifth Circuit's rejection of extrapolation of cotton dust studies in cotton yarn manufacturing to cotton ginning operations, *Texas Independent Ginners Association v. Marshall,* 630 F.2d 398 (5th Cir. 1980) the court below has continued the lead standard in effect as to the telecommunications industry notwithstanding this failure.

Both the Occupational Safety & Health Act and this Court's decision in *Industrial Union Department v. American Petroleum Institute, supra,* require that OSHA engage in reasoned decision making and explain the reasons for its actions. The lower court's decision, on the other hand, permits OSHA to adopt unreasoned and unexplained standards.

B. OSHA failed to demonstrate that a PEL of 50 ug/m³ is relevant to an industry characterized by intermittent exposure and there is no evidence in the record, let alone substantial evidence, to justify application of such a PEL to the telecommunications industry.

The heart of the OSHA standard dealing with occupational exposure to lead is the establishment of a 50 ug/m³ exposure limit. The establishment of such a limit was justified in the preamble to the standard on the basis of the theoretical model utilized by the Center for Policy Alternatives (CPA) to correllate air lead levels with blood lead levels. In upholding OSHA's adoption of a 50 ug/m³ standard, the court of appeals like OSHA relied on the CPA study. (Maj. Op. at 132-140) As both the CPA study and the opinion of the court of appeals below show, the duration of exposure to lead was a critical factor in establishing the 50 ug/m³ level. Thus, "a great deal of evidence suggests that during continuous exposure to lead the lead levels in some organs of the body increase slowly and inexurably." (Maj. Op. at 133), and "relying on a physiological model . . . CPA attempted to describe the response of blood lead levels to

air-lead exposure by examining the dynamics of blood lead transport and metabolism *in relation to the duration of lead exposure* and the physical properties of airborn lead particulates." (emphasis added) (Maj. Op. at 134) It is, of course, axiomatic that inhalation, the critical factor in applying an air-lead standard to determine blood-lead levels, is dependent upon both the air-lead level and the duration of exposure. Nor is there any question but that the CPA study dealt with an "occupational exposure . . . presented for five successive work days followed by two days of intake from solely non-occupational sources." (Ex. 439A, P. 3-8) In the telecommunications industry, however, exposure to lead is intermittent. This, of course, results in a substantially lower overall exposure and inhalation of lead, at any chosen PEL, than would a daily exposure. Petitioners herein pointed out to the court of appeals that, even if the CPA model were correct (which it demonstrably was not), there was no evidence in the record which would correlate a 50 ug/m^3 PEL in an industry characterized by intermittent exposure to lead with any selected blood-level, and thus there existed no evidence in the record which could justify application of a 50 ug/m^3 PEL to the telecommunications industry. While the majority of the panel below "examined LIA's major criticisms of the CPA analysis and OSHA's responses to the those criticisms" (Maj. Op. at 139) the panel never considered the arguments raised by the telecommunications industry. Instead, the court chose not to "second guess the particular way the agency chooses to weigh the conflicting evidence or resolve the dispute." (Maj. Op. at 139) However, the issue presented to the court of appeals below by these petitions was not one of resolving conflicting evidence in the record, rather, the issue presented was whether an agency may apply a permissible exposure limit to an industry characterized by intermittent exposure when all of the scientific evidence in the record utilized to support the permissible exposure limit concerned itself with continuous exposure to lead and when both the agency and the court of appeals below recognize that the nature of exposure—i.e. continuous vis-a-vis intermittent—

is a critical factor. In short, the court of appeals below by lumping your petitioners with more than forty other industries failed to provide these petitioners with the judicial review to which they are entitled.

CONCLUSION

For the foregoing reasons, this petition should be granted, and the Occupational Safety and Health Act standard for occupational exposure to lead, as applied to the telecommunications industry, should be vacated.

Dated: January 9, 1981

Respectfully submitted,

/s/ Carl F. Goodman

CARL F. GOODMAN
Surrey & Morse
485 Madison Avenue
New York, New York 10017
(212) 935-7700
Attorney for the Petitioner South Central Bell Telephone Company and Bell System, Petitioners

Of Counsel:

JAMES A. DEBOIS
JAMES E. BARDEN
American Telephone &
Telegraph Company
295 N. Maple Avenue
Basking Ridge, New Jersey 07920

January 9, 1981

APPENDIX

APPENDIX A

The subsidiaries and affiliates of American Telephone and Telegraph Company are:

American Bell Incorporated
American Bell International, Incorporated
American Telephone and Telegraph Company of Arkansas
American Telephone and Telegraph Company of Baltimore City
American Telephone and Telegraph Company of Delaware
The American Telephone and Telegraph Company of Illinois
American Telephone and Telegraph Company of Indiana, Inc.
American Telephone and Telegraph Company of Michigan
American Telephone and Telegraph Company of New Jersey
The American Telephone and Telegraph Company of Pennsylvania
American Telephone and Telegraph Company of Rhode Island
American Telephone and Telegraph Company of Virginia
The American Telephone and Telegraph Company of Wisconsin
American Telephone and Telegraph Company of Wyoming
AT&T International, Inc.
Bell Telephone Company of Nevada
The Bell Telephone Company of Pennsylvania
Bell Telephone Laboratories, Incorporated
195 Broadway Corporation
The Champaign Telephone Company
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia

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The Chesapeake and Potomac Telephone Company of West Virginia
Cincinnati Bell, Incorporated
Cuban American Telephone and Telegraph Company
The Diamond State Telephone Company
East Pittsburgh Telephone Company
Eastern Telephone and Telegraph Company (Canada)
Empire City Subway Company (Limited)
Illinois Bell Telephone Company
Indiana Bell Telephone Company, Incorporated
Malheur Home Telephone Company
Manufacturers' Junction Railway Company
Michigan Bell Telephone Company
The Mountain States Telephone and Telegraph Company
Muberta Development Company
Nassau Recycle Corporation
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
The Ohio Bell Telephone Company
The Ohio Telephone and Telegraph Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company
Sandia Corporation
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph Company
The Southern New England Telephone Company
Southwestern Bell Telephone Company
Southwestern Bell Telephone Company of Arkansas
Southwestern Bell Telephone Company (Oklahoma)
Teletype Corporation
Teletype International Sales Corporation
Texas Compensation Insurance Company
Transoceanic Cable Ship Company, Incorporated
Transoceanic Communications, Incorporated

Transpacific Communications, Incorporated
Western Electric Company, Incorporated
Western Electric Company, Limited (London)
Western Electric International, Incorporated
Wisconsin Telephone Company

see 80

1134

see 80

1170